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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, Appellant, v. BYRON BARLOW, JAMES E. BLACKWELL, and JAMES M. DOUGAN, partners as BYRON BARLOW & COMPANY.	No. 127.
BYRON BARLOW, JAMES E. BLACKWELL, and JAMES M. DOUGAN, partners as BYRON BARLOW & COMPANY, Appellants, v. THE UNITED STATES.	No. 128.

Motion for Modification of Judgment.

Now come Byron Barlow & Company, and move the court for a modification of the judgment rendered in these causes on the 24th day of February, 1902, so far as to include in the items to be allowed, that of three thousand nine hundred and sixty-seven dollars and sixty cents ($3,967.60) as the value of the stone actually quarried and cut for use in the dry-dock forming the subject of the contract out of which this claim arises, and in support of this motion, suggest the following ground:

That said stone was contracted for, quarried and cut, and the expense therefor incurred upon the faith of the statements, representations and assurances of the authorized engineer in charge of the work on said dry-dock, and

whose orders were upon any view of the case, binding upon the government, unless and until annulled, countermanded or revoked by his superiors in office, which was not done until after all such expense had been incurred and the work actually done, for which payment is sought by the item in question.

GEORGE A. KING,
Attorney for Appellees.

Brief in Support of Above Motion.

This motion is not an application for a rehearing of the entire cause on its merits. Nor does it even seek a modification of any of the principles announced in the opinion as the conclusions reached by a majority of the court. It simply asks the allowance of a single item — an allowance not inconsistent with, but (as seems to counsel) required by, the principles of the opinion rendered.

This is the item of Tenino sandstone, quarried and cut, but not transported, amounting to three thousand nine hundred and sixty-seven dollars and sixty cents ($3,967.60). The facts, as contained in Finding VII (Record, p. 42), quoted at page 6 of the opinion, are as follows:

"The claimants had also, before receiving notice of the rejection of the Tenino sandstone by the Bureau of Yards and Docks, caused to be quarried and cut, but not transported, 7,280 cubic feet, amounting, at 65 cents a foot, less the cost of transportation, 10½ cents a foot, 54½ cents a foot, to $3,967.60, making a total for stone actually quarried and cut, and part of which was delivered, of $5,494.45. That sum, however, has not been paid by the claimants to the owners of the said Tenino stone quarry, nor does it appear that any action or suit has ever been brought against the said claimants for said sum of money."

The stone in question was, it is true, not accepted as was the stone quarried, cut and delivered, amounting to one thousand five hundred and twenty-six dollars and eighty-five cents ($1,526.85), which is allowed by the judgment of this court. It was, however, prepared for delivery in accordance with the authority of the civil engineer in charge of the work, which authority was in any view valid until overruled by the Chief of the Bureau of Yards and Docks, or by the Secretary of the Navy, the engineer's superiors in office.

At the time the stone was prepared for delivery, not only had the authority of the engineer not been in any manner countermanded or set aside by his official superiors, but it had been in the strongest manner affirmed by letter of June 30, 1893, addressed by the Chief of the Bureau of Yards and Docks to the commandant of the Puget Sound Naval Station (Record, p. 39). The latter was thus instructed:

"In the further consideration of the matter the Bureau desires that it may be understood that it decides the contract and specifications to give *to the engineer the decision as to the standard of quality*, and he is fully authorized thereunder to fix upon the quality of sandstone he requires, by sample or otherwise, and require material equal to it."

The court below took the view that the decision of the engineer under the contract, bound the Government absolutely. This court holds that under other provisions of the contract, that decision was liable to be overruled by the Chief of the Bureau and Secretary of the Navy. Upon any view, the decision of the engineer was valid until overruled by his superior officers.

It is true (Opinion, p. 8), "The engineer was given power to judge, not a type of stone, but particular stones."

In this case, the engineer approved a sample of stone, and required the contractors to furnish material equal to it. Upon the faith of that approval and requirement, the contractors proceeded to incur heavy expense. Granting that the action of the engineer was not a finality, committing the government to the acceptance of any particular stones, it at least amounted to an authorized order under the contract, which order the claimants were not only justified in complying with, but which they were bound under time penalties (paragraph 9 of contract, Record, p. 19) to comply with promptly.

Two cases decided by this court, hold distinctly that where an order of this kind is given by an officer acting under a contract, and that order is afterwards revoked by the Government, all expenses incurred on the faith of the order prior to its revocation may be recovered by the contractor from the Government. These cases are *Bulkley* v. *United States*, 19 Wall. 27, and *Parish* v. *United States*, 100 U. S. 500. The latter case only will be here quoted, because it refers to the former. In that case a contract for ice provides (paragraph 2, 100 U. S. 501):

"That for each and every ton of ice delivered at Nashville, Tennessee, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of twenty-five dollars ($25)."

All the ice delivered and accepted was paid for, just as all the stone delivered and accepted in this case has been paid for, or will be, by the judgment of this court already rendered. The claimants, however, claimed to recover the expense of securing a certain amount of ice ordered by a local officer whose order was afterwards revoked by the Bureau at Washington, whereupon the ice melted away on the hands of the contractors and became a total loss.

The court says (p. 504):

"The opinion of the Court of Claims found in the record bases the dismissal of the petition on the ground that the Assistant Surgeon-General, in making the order on claimants for the 30,000 tons of ice, was acting so wholly without authority, that Parish & Co. had no right to treat it as of any validity or as one which they were bound to regard. In the argument of the case before us, the counsel for Government abandons this view of the matter, and, we think, very properly. We apprehend if the case were reversed, and the United States were suing for damages incurred by a refusal of the contractors to conform to this order, the amount specified being needed and not forthcoming, there would be no question of the validity of the notice of the Assistant Surgeon-General."

Again (taking a view similar to that just announced in this case as to the paramount authority of the Chief of the Bureau), the court says (p. 505):

"It is not intended to deny that he was subordinate to the chief of his bureau; could be ordered to do or not to do particular things; and when an order made by him was disapproved, it might be revoked by that officer. But until so revoked or disapproved it was valid, and parties required to act under it had a right to rely on it."

Again (p. 507):

"*Bulkley* v. *United States* (19 Wall. 37) is an analogous case. Bulkley had contracted to do all the transportation of supplies from Fort Leavenworth to army posts further west which might be required of him by the government. He was notified that 1,700,000 pounds would be needed, and he made large preparations to meet this requirement. The United States did not need half this amount, and the freight was not delivered to him. He claimed the profits which he would have made by the terms of the contract if the freight had been delivered and carried. This court said he could not recover profits, but that, 'in making ready to meet the requirements of the notice, he was subjected to the loss of time, to trouble and expense. He is entitled to be paid accordingly.'

"We think the case before us comes within that principle. Claimants are entitled to the expenses and losses incident to the preparation to meet the demand of the notice served on them."

The claim in this case for the stone quarried and cut, but not delivered, rests upon precisely the same grounds as justified a recovery in the *Bulkley* and *Parish* cases.

The action of the engineer in the present instance, amounted, at the least, to a notice to the contractors that stone from the Tenino quarry would be considered by him, and would not be rejected for the sole reason that the quarry did not contain a stone suitable for the work. If, upon the strength of his statements, they incurred expense preparing such stone for delivery, it was a *bona fide* compliance on their part with an order of an officer whose authority was at all events good until countermanded. All the expense was incurred before it was thus countermanded. The finding is express that the stone was quarried and cut "before receiving notice of the rejection of the Tenino sandstone by the Bureau of Yards and Docks."

Nearly four thousand dollars worth of stone has been quarried and cut by these claimants or (what is the same thing) by their sub-contractors, on the faith of the action of an officer set over them by the Government, whose orders they were powerless to question. These orders were afterwards set aside, and, as this court has held, by competent authority. But all acts done by the contractors on the faith of those orders while they remained in force should be sustained, and all expenses incurred in reliance upon them should be reimbursed. This can only be done by an allowance for the stone quarried and cut before receiving notice of the revocation of the engineer's approval. The amount claimed represents only its actual value on the ground where cut. The claim-

ants were not bound to incur the useless expense of transportation to the site of the work when notified in advance that it would not be accepted, and the court below excludes cost of transportation as an element in its value (see the finding, quoted p. 6 of opinion of this court). The value of this stone will be wholly lost unless now allowed by judgment of this court.

It is of no importance that the price of the stone has not been paid by the claimants to the owners of the quarry. The owners of the quarry, if not the claimants, incurred the expense of quarrying and cutting it, and can only work out their rights through the intervention and in the name of the principal contractors. This circumstance was regarded as of no weight as regards the item of stone actually delivered and accepted, amounting to $1,526.85, already allowed by this court. It is equally without weight as regards the item now under discussion.

It is therefore asked that the sum of $3,967.60 be added to the $5,367.96 allowed by the judgment already rendered, making a total allowance of $9,335.56.

Respectfully submitted,

GEORGE A. KING,
Attorney for Appellees.